Supreme Court, U.S.
FILED

931358 FEB 25 1994

OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM 1993

ERNEST JACKSON, SR.,

Petitioner,

vs.

RAYMOND HOYLMAN, U.S. MARSHAL
ROBERT BIDWELL, U.S. MARSHAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

George C. Rogers
Rogers, Godbey & Horner Co., LPA
606 Adams Street
Toledo, Ohio 43604
(419) 241-3113

On Behalf of Petitioner

10 11 P

QUESTIONS PRESENTED

1. Does the Civil Rule 6(B)(2) requirement of showing that "the failure to act was the result of excusable neglect" at a minimum require the movant to state some excuse, or at least, state a reason for the delay so that the trial court can evaluate the relevant circumstances, including the reason for the delay and whether it was in the movant's control, according to the test set forth in Pioneer Investment v. Brunswick (1993) 507 U.S. _____, 123 LEd 2d 74, 113 S Ct. 1489?

2. Does the Fourth Amendment require that a police officer executing an arrest warrant to have probable cause to believe that the person he is arresting is the person named in the warrant, or does the possession of a warrant give an officer absolute authority to arrest any

person without any attempted comparison with the description of the person named in the warrant?

3. Does a civil arrest warrant (for an errant grand juror) substitute for a search warrant under the Fourth Amendment to allow a search father's house for his son, or must the arrest warrant be a felony warrant to substitute for a search warrant, and does the father have an independent Fourth Amendment right to a search warrant separate from that of his son?

4. Does a magistrate have authority under 28 U.S.C.S. 636 to issue a civil contempt arrest warrant for an errant grand juror or is such authority limited to judges pursuant to 28 U.S.C.S. 636(e)?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

	Page
Questions Presented for Review.....	1
List of Parties to the Proceeding Below.....	3
Table of Authorities.....	4
Opinions Below.....	5
Statement of Jurisdiction....	6
Constitutional Provision,....	7
Statute and Rule Involved....	7
Statement of the Case.....	9
Reasons for Granting Writ	25
1. Minimum Requirements of Rule 6(B)(2).....	25
2. Fourth Amendment requires probable cause in execution of arrest warrant..	29
3. Civil contempt warrant no substitute for a search warrant.....	33
4. Magistrate has no authority under 28 U.S.C. Sec. 636(e) to issue a civil contempt warrant.....	36

Conclusion..... 38

Appendix..... App.1

1. Court of Appeals judgment of December 3, 1993
2. District Court summary judgment order of December 18, 1989
3. Defendants' Motion for Leave to file Answer out of Rule.
4. Plaintiffs Memorandum Contra Leave to File an Untimely Answer.
5. Motion for Default Judgment and Order Denying Motions stamped thereon of Mar 3, 1992.
6. The Contempt of Court Arrest Warrant.

TABLE OF AUTHORITIES

CASES:

Baker v. McCollan (1979) 443 U.S. 137, 61 LEd 2d 433, 99 S Ct. 2689
Lujan v. National Wildlife Federation (1990) 497 U.S. 871, 111 LEd 2d 695, 110 S. Ct. 3177
Miller v. Lint (1980) 62 Ohio St. 2d 209
Payton v. New York (1988) 445 U.S. 573, 63 LEd 2d 639, 100 Stet 1371
Pioneer Investment v. Brunswick (1993) 507 U.S. ____, 123 LEd 2d 74, 113 S. Ct. 1489
Powe v. Chicago (CA7, 1981) 664 F2d 639, 647
Steagald v. U.S. (1981) 451 U.S. 204, 68 LEd 2d 398, 101 S. Ct. 1642
U.S. v. Saunders (CA9, 1980) 641 F2d 659 cert den. 542 U.S. 918

CONSTITUTION, STATUTE, AND RULE:

Constitution of the United States, Fourth Amendment
United States Code, Section 636(e)
Federal Rules of Civil Procedure, Rule 6(b)(2)

MISCELLANEOUS:

Volume 7A, Federal Procedure, LEd, Contempt Section 17.10

In The
Supreme Court Of The United States

OCTOBER TERM 1993

ERNEST JACKSON, SR.,

Petitioner,

vs.

RAYMOND HOYLMAN, U.S. MARSHAL
ROBERT BIDWELL, U.S. MARSHAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST JACKSON, SR., the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 3, 1993.

OPINIONS BELOW

The December 3, 1993 opinion of the

Court of Appeals, whose judgment is herein sought to be reviewed, was rendered in Case No. 92-3554 and said opinion has not been published and is reprinted in the Appendix to this Petition, pp. A2. The opinion of the United States District Court for the northern District of Ohio, Western Division in Case No. CV 7208 on summary judgment also has not been published and it is reprinted in the Appendix to this Petition, pp. A29. The order of the United States District Court in said case allowing an untimely Answer to be filed by defendants is in the Appendix to the Petition at page A48.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

Constitution of the United States,

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. Section 636(e)

> (e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district

court would constitute contempt of such court. Upon the commission of any such act or conduct the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judgment of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judgment of that court.

Federal Rules of Civil Procedures, Rule 6(B)(2)

Rule 6, Time
(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1)... (2) upon motion made after the expiration of the

specified period permit the act to be done where the failure to act was the result of excusable neglect;...

STATEMENT OF THE CASE

Ernest J. Jackson, age 23, had been selected as a federal grand juror. When he failed to appear at several grand jury meetings, the United States Magistrate, James Carr, issue a civil warrant for his arrest. The warrant was for his failure to show up for grand jury duty. The only information on the back of such warrant was the physical characteristics of Ernest J. Jackson, that he was a black male, age 23. His social security number was listed as 300-66-7451. His last known residence was listed as 1459 Palmetto in Toledo, Ohio, this is the home owned by Ernie Jackson, Sr., and Nellie Jackson. After getting the arrest warrant on November 30, 1988 the Marshals called the telephone number on the warrant and

talked with person identified as Ernest Jackson who refused to come to the courthouse and whom was told that the Marshals were going to come get him. A short while later Deputy Marshals Raymond Hoylman and Robert Bidwell went to Ernest Jackson, Sr.'s home, knocked on the front and rear doors and got no response, and saw that there were no cars in the driveway. Deputy Bidwell found the rear door unlocked. Both deputies entered the house without a search warrant. They checked the basement and first floor and finding no one they went to the second floor.

Petitioner, Ernie Jackson, Sr. was in bed in a second floor bedroom. The marshalls testified that when they entered the bedroom they identified themselves. Ernie Jackson, Sr. was talking on the phone when two white men unknown to him appeared in his bedroom.

He immediately requested the person to whom he was talking to call the police. His only profanity was to the effect "Who the hell are you? What in the hell do you want? Get the hell out of my house." Marshal Hoylman immediately (within 15 seconds) came up to his bed, grabbed the phone out of his hand and climbed onto the bed with Mr. Jackson and pushed Mr. Jackson back on the bed with Hoylman's arm against his neck, so that he could not move. Marshal Bidwell climbed onto the bed and hand- cuffed Mr. Jackson. Hoylman and Bidwell did not check the name, age, nor social security number of Ernest Jackson, Sr. before arresting him.

> Q. Alright, so what steps did you take besides the loud voice and this person being in the house, did you take to identify this as Ernest Jackson prior to arresting him?
>
> A. We didn't, we couldn't

because he wouldn't cooperate.

Page 20,

> Q. What steps did you usually take before to identify somebody before serving them with a bench warrant?
>
> A. This, usually they talk to you and you find out, he was not cooperative at all from the start, I mean, all he did was holler at us and we couldn't find out who he was, til he got up and we was trying to talk to him and as far as I'm concerned he was Ernest Jackson in Ernest Jackson's house at the address the warrant called for.

Page 27,

> Q. Alright, so it certainly wouldn't have caused any harm, I suppose, to spend another couple of minutes talking with this person as long as he remained in the bed, trying to continue to talk to him and identify who he was, would it?
>
> A. I don't know what he's got in that bed with him and I wasn't wanting to spend a whole lot of time when the name was that angry waiting to find out what he had in that bed with him.

Deputy Hoylman had made no effort to identify appellant as the person

named in the warrant prior to arresting him. Hoylman finally admitted on cross-examination that appellant never even sat up in bed until after the cuffs were on him. Hoylman further admitted under cross-examination that he ordered Bidwell to cuff appellant as Bidwell came up to the right side of the bed and before Bidwell got on the bed. Then Hoylman changes his story somewhat, but states that he told Bidwell to cuff appellant because his right hand was held. Hoylman stated that he ordered appellant cuffed as an arrest for resisting arrest. Deputy Hoylman admitted that appellant's hands were in plain sight, that he was laying in bed in only his undershorts, and had covers that partially covered some part of his legs.

It was only after petitioner was cuffed, Marshal Hoylman testified, that

he noticed that petitioner had gray hair and that he was not likely to be the age 23 for the person named in the warrant. After looking at petitioner's billfold on the nightstand it was obvious that petitioner was not the person described in the warrant. Petitioner had severe back pain from his seven previously fused discs in his back from the force used in the arrest.

At this point the Marshals did not apologize and release petitioner. They took him in cuffs to the Federal Building and charged him with a felony of resisting arrest/assault on U.S. Marshals, a complaint notarized by the U.S. Magistrate The U.S. Magistrate then conducted a preliminary hearing on December 6, 1989 and found probable cause to bind petitioner over to the grand jury. (The facts of this case as previously cited come from the affidavit

of the Marshals and the testimony at the preliminary hearing.) The grand jury refused to indict petitioner and he was discharged.

Petitioner then filed his complaint on March 2, 1989., a Bivens Action, in State Court with related state claims. Plaintiff made four claims; first, that defendants violated his Fourth Amendment rights by entering his home without a search warrant and with no recognized exigent circumstances; second, that defendants deprived him of his liberty by arresting him without probable cause to believe he was wanted for the offense in the warrant; third, of using excessive use of force in making his arrest; and fourth, that the deprivation of liberty suffered as a result of the fabricated charge of resisting arrest filed by the deputies without probable cause. The other count stated a State

malicious prosecution claim. On March 30, 1989 defendants removed the action from State Court to the Federal District Court for the Northern District of Ohio. The defendants moved for Summary Judgment on June 9, 1989. On December 18, 1989, the Trial Court dismissed the State claims and the claim for unlawful search and seizure of Ernest Jackson, Sr.'s home and person pursuant to an invalid warrant and lack of probable cause. The Trial Court left both the excessive force claim Count II, and the Deprivation of Liberty Without Due Process claim as it related to the arrest and prosecution for resisting arrest.

As to Count I, the Trial Court held that the non-criminal arrest warrant issued by Magistrate Carr for an errant grand juror was a sufficient constitute for a search warrant pursuant to Payton

v. New York (1980) 445 U.S. 573, where a felony arrest warrant was a sufficient substitute for a search warrant for the suspects house. However, this does not protect the fourth amendment interests of the homeowner recognized in Steagald v. U.S. (1981) 451 U.S. 204.

As to the second claim, the court held that the part of such count predicated on arresting the wrong person was insufficient since the Sixth Circuit Court of Appeals in Masters v. Crouch (CA6, 1989) 872 F 2d 1248, 1253 had found no case holding an arresting officer with a valid warrant... liable in a Section 1983 for arresting and detaining the wrong person. However, in this case, the sole specific characteristics that the deputies had to identify Ernie Jackson was that he was age 23 and his social security number. They had no height, weight, scars,

facial hair, or other description. The failure to check the only objective identifiers they had before assaulting or seizing appellant (climbing on the bed and touching him) is claimed as evidence of bad faith and lack of probable cause. Deputy Hoylman, after he had appellant pinned to the bed, noted the gray hairs in the facial hair of appellant and admitted he made no attempt to check age before getting on the bed. In the Trial Court's consideration of Count II and Count III together after reviewing the evidence concluded that there was sufficient contradictory evidence on the use of force "and whether the plaintiff was actively resisting arrest" and where credibility would have to be assumed and which, if believed, established excessive force and lack of resistance; and therefore, that summary judgment was

excluded following the standard of Graham v. Connor (1989) 109 S.C. 1865. The court also denied summary judgment on Jackson, Sr. on the charge of resisting arrest.

Defendants failed to file an answer when due on December 28,1989. Defendants filed an interlocutory appeal pursuant to statutory right to this court on January 16, 1990. The Court of Appeals on June 18, 1991 affirmed the the Trial Courts order refusing to grant summary judgment to defendants. The defendants failed to file an answer after a return of the case to the District Court. On October 4, 1991 the Trial Court set the case for trial on April 28, 1992. The defendants on October 11, 1991 filed a spurious motion to dismiss on October 15, 1991 which related to the remaining second arrest claim for resisting arrest. The Motion

was denied on January 30, 1992. The defendants filed a spurious motion to limit plaintiff's claim relating to the second arrest for resisting arrest. Plaintiff requested sanctions. Defendants motion in limine was denied and sanctions were denied on April 20, 1992.

Defendants moved for leave to file an Answer Instanter on February 21, 1992.[1] However, they stated no good cause nor excusable neglect for failure to file an answer back in December of 1989. Plaintiff opposed such motion and moved for default judgment on February

---

[1] The Marshalls' motion stated:
> The motions to dismiss and summary judgment filed on behalf of defendants having been denied in the interest of justice and in order to resolve the case on the merits, leave is now requested to answer the complaint.

27, 1992. The trial court on March 3, 1992 denied plaintiffs motion for default judgment even though no answer was filed. On March 9, 1992 (less than sixty days prior to trial) the Trial Court granted defendants leave to file their answer instanter. Defendants filed an answer on March 9, 1992.

The trial commenced on April 29, 1992 before a jury. During the trial, a major portion of defendant's cross examination and case in chief was devoted to discussing 15 to 16 year old misdemeanor convictions, 30 years old gunshot wounds, a history of venereal disease and other irrelevant unrelated issues. The Trial Court allowed all such inadmissible evidence over the strenuous objection of plaintiff. The Trial Court gave jury instructions promulgated by defendants that were clearly inapplicable to the issue of the

standard of conduct to be applied to the second arrest for resisting arrest and would confuse the jury because the instructions dealt with the validity and ramifications of the conduct of the defendants in the first arrest under the warrant. These instructions were objected to by plaintiff for just such reason. The Trial Court refused to give the instructions requested by plaintiff and taken from a decision that discusses the factors that should be considered in evaluating the appropriate degree of force to be used.

The jury returned a verdict for defendants on the excessive force and second arrest for resisting arrest claim, and the Trial court entered final judgment dismissing plaintiffs case on May 19, 1992. Plaintiff filed his notice of appeal to the Court of appeals on June 2, 1992.

On December 3, 1993 the Court of Appeals for the Sixth Circuit affirmed the trial courts orders. No reason, error, or excuse for the delay was ever proffered by defense counsel for the over two years delay in filing an answer and the Court of Appeals required none merely stating "Under the particular circumstances of this case, we cannot conclude that the district court abused its discretion by allowing the defendant to file the late answer." Petitioner has a right to know what particular circumstances are being referred to.

The Court of Appeals also noted,

> "Jackson asserts that prior to making an arrest, an officer must have probable cause that the person they are arresting is the person named in the warrant."
>
> However, "the Constitution does not guarantee that only the guilty will be arrested; police.... may rely on facially valid arrest warrants even in the fact of vehement claims of innocence

> by reason of mistaken identity or otherwise." Master 872 F. 2d at 1253 (citing Baker v. McCollan, 443 U.S. 137, 145 (1979)

The Court of Appeals has held that petitions' proposition is incorrect. Under the Court of Appeals ruling a police officer with a facially valid warrant for a 6'5" black male doesn't need probable cause to believe that it is for a 5'2" white female before arresting her under such warrant.

The Court of Appeals failed to address the argument that a civil arrest warrant is not the equivalent of a felony arrest warrant to be a constitutionally adequate substitute for a search warrant for entry into a home.

Finally, the Court of Appeals found that a Magistrate had authority to issue an arrest warrant under 28 U.S.C. Sec. 1866(g) dealing with a summons, not a warrant. Under 28 U.S.C. Sec. 636(e) the power to issue a warrant for failure

to appear on a summons is reserved to a judge.

This opinion was not recommended for publication. Petitioner recommends that certiorari be granted so that the opinion can be completely eliminated.

REASONS FOR GRANTING WRIT

I. Minimum Requirements of Rule 6(B)(2)

This Court has recently addressed the requirements of Rule 6(B)(2) and related Bankruptcy Rule 9000(b)(1) in Lujan v. National Wildlife Federation (1990) 497 U.S. 871, 111 L Ed 2d 695, 110 S Ct 3177 and Pioneer Investment v. Brunswick (1993) 507 U.S. ___, 123 L. Ed 2d 74, 113 S. Ct 1489 and should not have to have to address the issues again, but for the fact that the Court of Appeals for the Sixth Circuit has ignored even the minimal requirement set forth in Pioneer Investment supra that there be at least a reason for the delay

given so that it can be evaluated as part of "all relevant circumstances surrounding the party's omission".

In this case defendant has never once given a reason for the years delay in filing the Answer. In defendants' motion for leave they stated the "interests of justice" required leave. In later filings defendants attempted to justify the trial court's grant of leave saying the record showed a change of counsel and motion to dismiss. Plaintiff pointed out that the record showed that change of counsel and defendants' motions did not occur until will after the Answer was already overdue and therefore could not have been a cause of or reason for the untimeliness. Defense counsel proffered during oral argument in the Court of Appeals that the reason for the delay was "procedural abnormalities". When

asked what she meant she stated she was referring to the interlocutory appeal and the motions made after such appeal. There is nothing abnormal about an interlocutory appeal or a party making motions and as stated defendants were already untimely as of these events. The Court of Appeals continued this obfuscation with its "under the particular circumstances of this case" which allows the requirements of Rule 6(b)(2) to be evaded. Counsel for petitioner is incensed by such obfuscation and lack of an articuable basis or standard which allows government employees to escape complying with the plain requirements of Rule 6(b)(2).

The Ohio Supreme Court has recognized in a similar case that there must be some minimal compliance with Rule 6(b)(2) or the only alternative is

a complete abandonment of the rule. In Miller v. Lint (1980) 62 Ohio St. 2d 209 at 214-215 the Court States in pertinent part, in a case where the trial court granted leave to file her answer,

> ... the defendant... proceeded to file her answer, but this filing did not comport with the requirements of Civ. R. 6(B)(2), which provides that such a late filing can only be accomplished "upon motion" and "where the failure to act was the result of excusable neglect."....
>
> While this court is in general agreement with the universal practice of allowing trial courts broad discretion in settling procedural matters, such discretion, as evidenced by Civ. R. 6(b) is not unlimited, and under the circumstances existing on April 14, 1977, some showing of "excessible neglect" was a necessary prelude to the filing of the answer... .
>
> However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only

> fair and reasonable alternative thereto is
>
> complete abandonment... . (Emphasis added)

If defendant government employees only have to state that the "interest of justice" entitles them to not have to comply with the Civil Rules regarding the filing of an Answer to a complaint then the words "good cause shown" and "excusable neglect" in Civil Rule 6(B)(2) mean nothing.

Petitioner's motion for a default judgment in the trial court should have been granted when no excusable neglect or reason was even proffered by defendants.

II. THE FOURTH AMENDMENT REQUIRES PROBABLE CAUSE IN THE EXECUTION OF AN ARREST WARRANT.

It is clear from a long line of decisions of this Court that a person can only be arrested without a warrant when there is probable cause to believe

that he or she committed a crime. It is also clear that a warrant for a person's arrest may not be issued except upon oath of affirmation based upon probable cause that the person named therein committed a crime. What has not been clearly stated by this Court and has been perhaps obscured by Baker v. McCollan (1979) 443 U.S. 137, 61 L Ed 2d 433, 99 S. Ct. 2689 is that the Fourth Amendment protects a person from seizure of his person without probable cause to believe that he or she is the person named in the warrant (which is probable cause to believe that person is guilty of a crime.)

An outrageous example is often useful in demonstrating the context of constitutional protection. Petitioner asserts that a police officer cannot take a facially valid search warrant for a 6'4" black male and with

constitutional impugnity arrest a 5'2" white female. Petitioner asserts that this would violate the 5'2" white female's Fourth Amendment right to be secure in her person. Such conduct would "create a substantial risk", "that an innocent person to whom not the least suspicion has attached will be arrested," as described in Powe v. Chicago (CA7, 1981) 664 F 2d 639 at 647. If such conduct does indeed violate her Fourth Amendment right, then what standard should the police officer's conduct be measured by in the execution of a warrant. Petitioner submits that it is the standard of probable cause, as stated in the Fourth Amendment.

Contrary to the Court of Appeals assertion Baker v. McCollan, supra is not controlling here. In Baker a brother had used his brother's identification during the initial stop

and when a warrant was issued for the brother and he was arrested under it there was an ideal match between the person named in the warrant and the person arrested giving officers probable cause to arrest the brother. That is not the situation here, the Marshals had a very incomplete description with only name, social security number, age 23, and a black male. They had no match on the name (petitioner had not identified himself prior to being handcuffed), they did not attempt to check age or social security number, so that any of 500 million black males in the world who could have been in that room on that day would have arrested. They admitted they made no attempt to identify the person in the bedroom prior to the arrest.

> Q. Alright, so what steps did you take besides the loud voice and this person being in the house, did you take to identify this as Ernest

> Jackson prior to arresting him? A. We didn't, we couldn't because he wouldn't cooperate.
>
> Q. What steps did you usually take before to identify somebody before serving them with a bench warrant?
>
> A. This, usually they talk to you and you find out, he was not cooperative at all from the start, I mean, all he did was holler at us and we couldn't find out who he was, til he got up and we was trying to talk to him and as far as I'm concerned he was Ernest Jackson in Ernest Jackson's house at the address the warrant called for.

There was, if not a determination as a matter of law that the Marshals had no probable cause to believe petitioner was the person named in the warrant, at least a jury question about such issue and the trial court erred in granting defendants summary judgment on such issue.

III. CIVIL CONTEMPT WARRANT IS NO SUBSTITUTE FOR A SEARCH WARRANT FOR CONDUCTING A RESIDENTIAL SEARCH.

This Court in Payton v. New York

(1980) 445 U.S. 573, 63 L Ed 2d 639, 110 S Ct 1371 has held that a valid felony arrest warrant is a substitute for a search warrant authorizing the government to conduct a search of that person's home for the purpose of arresting him. Petitioner has no argument with that holding. Petitioner does, however, believe that there are historical and important public policy considerations that distinguish felonies from misdemeanors from civil contempt proceedings which would mandate a result that civil contempt warrants should not be elevated to a status of a search warrant for purposes of conducting a residential search. It has been recognized that suspicion of a felony authorizes an officer to demand a suspect get out of his car and submit to a limited search, whereas a non-jailable traffic misdemeanor does not justify an

officer to order the suspected offender from a vehicle. The home is considered a bastion of safety that a homeowner may protect with deadly force, but the risk of harm from mistake can be accepted when the public need to apprehend a felon is considered. The risk of harm from a mistake that can occur from the invasion of a home is not outweighed by the relatively minor inconvenience of not being able to quickly bring a civilly disobedient citizen quickly to justice. The Marshals in this case attempted to justify their failure to first identify the person in the bed as the person wanted in the warrant on the basis of the danger inherent in the bedroom confrontation required immediate arrest and handcuffing of this alleged civil contemnor. Petitioner submits that the Marshals should not have been in the home in the first instance

without a search warrant.

Finally, petitioner had a separate Fourth Amendment interest under Steagald v. U.S. (1981) U.S. 204, 68 L Ed 2d 398, 101 S Ct 1642.

IV. A MAGISTRATE HAS NO AUTHORITY UNDER 28 U.S.C. SEC. 636(e) TO ISSUE A CIVIL CONTEMPT ARREST WARRANT.

28 U.S.C. Sec. 636(e) provides that refusal to appear after receiving a summons shall constitute contempt and that upon commission of such an act the Magistrate shall certify the facts to a judge of the district court... A judge of the district court shall... punish such person... In this case the grand juror, petitioner's son, did not show up for grand jury duty. The Magistrate issued him a summons and when he did not appear issued a "warrant for arrest" for Ernest Jackson for "contempt of Court Order". Petitioner submits that the Magistrate was required to certify the

facts to a judge of the District Court and that only a judge could issue an arrest warrant for contempt. The Court of Appeals stated that the Marshals were entitled to rely on the facially valid arrest warrant. Petitioner agrees as long as such warrant was used to effectuate an arrest. However, when used as a search warrant, the burden is upon the Marshals to show that they had a good faith belief that they could conduct a search without a search warrant on a recognized exception to the law. There is no law that establishes a civil contempt arrest warrant is a substitute for a search warrant and therefore it would be difficult to understand the good faith basis that the Marshals had for entering the house through an unlocked door without a search warrant.

CONCLUSION

This court is asked to review several important issues of law. Petitioner submits that this case should be reviewed because two of the issues are of vital concern on two very different bases. The first issue of the minimal requirements of Rule 6(b)(2) deals with the fundamental integrity of the judicial system (as stated by the Ohio Supreme Court) that is dependent upon consistent enforcement of procedural rules because the alternative is complete abandonment of the rules. Abrogating any requirement that government employees follow the rules, even minimally, is unfair to all those parties who must do so. The second issue appears to be such a basic fundamental constitutional proposition that counsel for petitioner has been stunned that it hasn't ever been

explicitly stated by this court or some other court. The proposition is that the Fourth Amendment protects a citizen from seizure of his or her person until there is probable cause to believe that citizen has committed an offense or that there is probable cause to believe that citizen is the person named in a warrant that charges an offense. This court should hear this case because its pronouncement in Baker v. McCollan supra may lead some courts, such as the court below, to believe that such a fundamental constitutional proposition is not true.

Respectfully submitted,

By:_____

George C. Rogers
ROGERS, GODBEY & HORNER CO., LPA
606 Adams Street
Toledo, Ohio 43604
Phone: (419) 241-3113
Fax: (419) 241-2255

APPENDIX

Court of Appeals Judgment
of December 3, 1993

District Court summary
Judgment Order of December
18, 1989

Defendants' Motion for Leave
to file an Untimely Answer.

Motion for Default
Judgment and Order Denying
Motions stamped thereon
of March 3, 1992.

The Contempt of Court
Arrest Warrant.

NOT RECOMMENDED FOR PUBLICATION

Nos. 92-3554 and 92-3607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST JACKSON, SR.,

Plaintiff-Appellant,
Cross-Appellee,

v.

FILED
Dec 03 1993
Leonard Green, Clerk

RAYMOND HOYLMAN
DEPUTY U.S. MARSHAL;
ROBERT BIDWELL
DEPUTY U.S. MARSHAL,

Defendants-Appellees,
Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BEFORE: **BOGGS and SUHRHEINRICH**, Circuit Judges; and **BROWN**, Senior Circuit Judge.

PER CURIAM. Plaintiff Ernest Jackson, Sr. ("Jackson") appeals final judgment for defendants Raymond Hoylman ("Hoylman") and Robert Bidwell ("Bidwell"), federal deputy marshals, in

a Bivens action challenging Jackson's arrest by the defendants. Jackson alleged several theories of liability.

I

Initially, the district court denied, in part, the defendants' summary judgment motion in which they asserted defenses and relief on qualified immunity. The defendants then appealed this denial and this court affirmed. Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991). On remand, at the trial, the jury rendered a verdict for the defendants. On this second appeal, Jackson contends that the district court erred in granting, prior to the trial, summary judgment to defendants with respect to other theories of liability upon which the defendants relied, and erred at the trial in other respects. The defendants cross-appeal, but we need not, in view of our disposition of the

issues, resolve the cross-appeal.

Upon the prior appeal, in addressing the question whether the district court erred in denying in part the defendants' summary judgment motion, this court outlined the facts as follows:

> This case arises from the attempt by Deputy United States Marshals Hoylman and Bidwell to arrest Ernest Jackson, Jr. [defendant's son] for failure to appear in response to a summons for service as a grand juror. After receiving a warrant for Jackson's arrest, the marshals telephoned the number listed on the warrant and spoke to a man who identified himself as Ernest Jackson. Jackson refused to go to the courthouse for jury duty and told the marshals that they would have to come get him. Approximately fifteen minutes later, Hoylman and Bidwell arrived at Jackson's home. They knocked at both the front and back doors, loudly announced themselves as deputy marshals with a warrant for Jackson's arrest, and asked that he come forward. There was no response. Seeing a light on in the back of the

house, the marshals entered and again shouted their identities and ordered Jackson to come forward. Still, there was no response. When they found no one downstairs, they proceeded upstairs.

The marshals found Jackson [Sr.] in his bedroom talking on the telephone. It is impossible for us... to determine what happened next. Plaintiff and defendants offer radically different versions of what occurred...

* * * * *

Jackson [Sr.], a black man, alleged that he was talking on the telephone in his bedroom when two white strangers, dressed in plainclothes, appeared unannounced in the doorway. The room was dark and Jackson did not see them show an identification. He became frightened at their presence and asked them to leave. He asked the person to whom he was speaking on the telephone to call the police. He contends that his hands were in plain view and that there was nowhere that he could have hidden a gun. Hoylman immediately grabbed the telephone out of Jackson's hand, climbed onto the bed and told him to relax. Hoylman then pushed Jackson back on the bed with his arm under Jackson's neck. Bidwell, as

> ordered, handcuffed Jackson who, because of previous back surgery, was unable to resist in any way. Jackson claims that prior to handcuffing him, the marshals made no effort to verify that Jackson was the person named in the warrant.
>
> Hoylman testified that he and his partner announced themselves "twenty times in that house, loudly" but received no response. When they finally found Jackson in the upstairs bedroom, they identified themselves as marshals and repeatedly asked whether he was Ernest Jackson. Jackson responded only by searing and shouting that they should get out of his house and that they had no rights there. Hoylman approached the bed with the warrant in his hand and tried once again to identify himself and explain their purpose in being there. Jackson swung at him and they "struggled for, seemed like a long time, maybe a minute or two. Mr. Jackson was kicking and swinging and fighting hard." Hoylman testified that he only asked Bidwell to handcuff Jackson when Jackson, after being held down on the bed by Hoylman, continued to wing and kick at the marshals.

Id. at 401-403.

A criminal complaint was filed

against Jackson for forcibly assaulting, resisting, opposing, impeding, and interfering with the marshals, but the grand jury did not indict him. Jackson then filed a Bivens action[1] against the marshals in an Ohio state court, but the case was removed to federal district court. The district court dismissed, on summary judgment, the Fourth Amendment claims for an unlawful search of Jackson's home and for arrest of Jackson on a warrant that was actually issued for his son if he was arrested under the warrant and not for resisting arrest, and held that Jackson presented constitutional claims of unlawful arrest

---

[1] See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (holding complaint asserting that narcotics agents entered petitioner's apartment without a warrant, searched the apartment, and arrested him, all without probable cause, stated federal claim for damages under Fourth Amendment).

and excessive force. After this court, as stated, affirmed such denial of summary judgment for the marshals, Jackson, 933 F.2d at 402-403, upon remand and trial, the jury rendered a verdict for the marshals on all issues presented to it.

On appeal, Jackson presents five issues: (1) whether the trial court erred in granting summary judgment on his claim that his Fourth Amendment rights were violated by his arrest on a warrant actually issued for his son; (2) whether the trial court erred in granting summary judgment on his claim that an illegal search of his home violated his Fourth Amendment rights; (3) whether the trial court abused its discretion in denying his motion for default judgment and permitting the

defendants to file an answer instanter;[2] (4) whether the trial court erred in admitting evidence of Jackson's prior medical history and past encounters with law enforcement officers as being relevant to his claims of physical and emotional damages following his arrest; and (5) whether the jury instructions were proper.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. This court reviews the district court's grant of summary judgment de novo. United States v. TRW, Inc., 4 F.3d 417,

---

[2] "Instanter" means "immediately; instantly; forthwith; without delay." Black's Law Dictionary 799 (6th ed. 1990).

423 (6th Cir. 1993).

III

We first address the question whether the trial court \ erred in granting summary judgment on Jackson's claim that his Fourth Amendment rights were violated by arresting him on a warrant issued for his son. On November 22, 1988, Magistrate James G. Carr signed a "Show Cause Order Under 28 U.S.C. 1866(g)" ordering "Ernest Jackson" to appear on November 29 to show cause why he failed to comply with a grand jury summons. It is undisputed that the member of the grand jury was Jackson's son, Ernest Jackson, Jr. When Jackson, Jr. did not appear on November 29, the magistrate issued a "Warrant for Arrest" of "Ernest Jackson." On the back of the warrant was inscribed a name (Ernest J. Jackson); last known residence (1459 Palmetto, Toledo, OH

43606 Phone:[]; last known employment (Minister); date of birth (Age 23 as of January 1988); social security number (300-66-7451); sex (Male); and race (Black).

In arguing that the district court erred in granting summary judgment to the marshals on his claim that his arrest on a warrant issued for his son violated his Fourth Amendment rights, Jackson asserts that prior to making an arrest, officers must have probable cause that the person they are arresting is the person named in the warrant.

However, "the Constitution does not guarantee that only the guilty will be arrested; police . . . may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistaken identity or otherwise." Masters, 872 F.2d at 1253 (citing Baker v. McCollan, 443 U.S. 137,

145 (1979)). In Baker, one McCollan was arrested and detained for three days under a warrant for his brother. Similarly, in this case, Jackson was arrested under a warrant for his son. Since the arrest warrant in Baker conformed to Fourth Amendment requirements, the Supreme Court held McCollan did not state a federal constitutional claim. 443 U.S. at 144. Addressing the Fourteenth Amendment due process claim, the Court noted:

> Respondent's innocence of the charge contained in the warrant . . . is largely irrelevant to his claim of deprivation of liberty without due process of law . . .
>
> [W]e do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent.

Id. at 145-146 (footnote omitted).

Since the arrest was based on the warrant, the marshals relied on a facially valid arrest warrant issued by Magistrate Carr. Therefore, under Masters, Baker, and the specific facts of this case, the marshals could arrest Jackson, Sr., even if he claimed he was not the person named in the warrant, without incurring liability. The trial court's grant of summary judgment on this issue was proper.[3]

IV

We next appraise whether the trial court erred in granting summary judgment

---

[3] See also Criss v. City of Kent, 867 F.2d 259, 263 (6th Cir. 1988) (holding policeman under no obligation to give any credence to suspect's explanation of innocence); White v. City of Muskegon, 749 F. Supp. 829, 831 (W.D. Mich. 1990) (holding man mistakenly arrested after traffic violation under outstanding felony arrest warrant for individual with same named failed to state actionable constitution claim based on his detention, citing Baker and Masters).

on Jackson's claim that an illegal search violated his Fourth Amendment rights. Jackson asserts that the arrest warrant for his son was not an effective substitute for a search warrant for his home since he had a Fourth Amendment privacy interest as a "third party" not named in the arrest warrant. The marshals rely, as did the district court, on Payton v. New York, 445 U.S. 573 (1980), in asserting a search warrant was unnecessary. Under Payton, "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. The district court determined the marshals had probable cause to believe that the Ernest Jackson named on the warrant lived at 1459

Palmetto, the address on the warrant, because it was without dispute that Hoylman telephoned an "Ernest Jackson" at the telephone number listed on the warrant, that an Ernest Jackson identified himself as the juror who refused to appear for jury duty, and that the marshals then proceeded forthwith to the home. While Jackson, Sr., denied that he had such a telephone conversation with the marshals, he did not contend that the marshals did not talk to his son.

Since the marshals had probable cause to believe that Ernest Jackson, who was the subject of the arrest warrant, lived at 1459 Palmetto, and believed he was probably there at the time of their search, the grant of summary judgment for the marshals was

proper under Payton.[4]

Jackson next claims the trial court abused its discretion in denying his motion for default judgment and permitting the defendants to file an answer instanter. We review the action of the trial court allowing the marshals to file a late answer under the abuse of discretion standard. See Hill v. Marshall, 861 F.2d 720, 1988 WL 117163 at *2 (6th Cir. 1988) (unpublished) (holding where plaintiff did not assert his case had been prejudiced by

---

[4] Jackson argues on appeal that this search was illegal because the magistrate had no authority to issue the arrest warrant. It does not appear that Jackson made this contention below. In any case, it is clear that the magistrate did have such authority. See Fed. R. Crim. P. 4; 28 U.S.C. Sec. 1866(g); and district court local order of October 4, 1979, assigning grand jury duties to Magistrate Carr (Brief of Defendants-Appellees at 36). In any event, the marshals could properly rely on a facially valid arrest warrant. Baker v. McCollan, 443 U.S. 137, 145-46 (1979).

defendant's delay in filing the answer, and plaintiff did not give notice to anyone that an answer had not been filed, and defendant explained why he did not file a timely answer, the trial court did not abuse its discretion in allowing an answer to be filed).

After Jackson initially filed this case in an Ohio court on March 2, 1989, the case was removed to federal district court. The court granted the marshals an extension of time to file an answer until June 14, 1989. On June 9, the marshals moved to dismiss the case or in the alternative for summary judgment. On December 18, 1989, the district court granted in part and denied in part the marshals' motion to dismiss. After the marshals filed for interlocutory appeal, we affirmed the decision of the trial court on May 22, 1991. Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991).

The marshals moved for substitution of party defendants on October 11, 1991 and moved to dismiss on October 15, 1991; the district court denied these motions on January 30, 1992. The marshals filed deposition notices in February 1992.

On February 21, 1992, the marshals filed a Motion to Answer Instanter;[5] Jackson filed a motion for default judgment on February 27, which was denied on March 3. The court granted the marshals leave to file the answer on March 9, 1992. Thus, no answer was filed in the action which started March 7, 1989, until March 9, 1992.

---

[5] The Marshals' motion stated:

> The motions to dismiss and summary judgment filed on behalf of defendants having been denied, in the interest of justice and in order to resolve the case on the merits, leave is now requested to answer the complaint.

Citing the language of Rule 6(b), Jackson contends the district court had no discretion to allow filing of the marshals' late answer "when there was no cause shown and no excusable neglect asserted in the request." Thus, Jackson asserts, the court's denial of his motion for default judgment was clearly erroneous. Under Federal R. Civ. P. 6(b),

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . .

In addition, Jackson contends the late

answer prejudiced his case since defendants were allowed to raise affirmative defenses in their answer less than sixty days before trial. The marshals, however, allege Jackson had notice of their defenses through their motion to dismiss and the subsequent appeal.

Under the particular circumstances of this case, we cannot conclude that the district court abused its discretion by allowing the defendant to file the late answer. Cf. Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489 (1993) (discussing bankruptcy rule patterned after Fed. R. Civ. P. 6(b)).

VI

We also consider whether the trial court erred in admitting evidence of Jackson's prior medical history and past encounters with law enforcement officers

as being relevant to Jackson's claims of physical and emotional damages following his arrest. Jackson first claims evidence of misdemeanor assault convictions was inadmissible for the purpose of attacking his credibility under Fed. R. Evid. 609(a) or to prove his character under Rule 404(b). He also claims it was not relevant under Rule 402, and that any relevance was outweighed by its prejudicial effect under Rule 403. The defense elicited from Jackson that he served sixty days for assault and battery in 1970 and ten days for assault and battery in 1973, and that he was charged with aggravated menacing in 1974 and 1975. Jackson asserts this damaged his credibility in the eyes of the jury.

Jackson next avers that the court erred by admitting evidence of a thirty-year-old gunshot wound which was

allegedly not relevant to his injuries at issue in this case. Finally, he objects to the reference to his gonorrhea.

In his complaint, Jackson alleges that "as a result of defendants' conduct, plaintiff suffered injury to his throat, shoulders and severe aggrivation (sic) of previously existing back injury, as well as fear and mental anguish during such altercation," and that he "suffered humiliation, anger, mental anguish, and despair upon being arrested and held on charges which were without foundation." Jackson testified about physical injuries he sustained at the time of his arrest and also emotional injuries including nightmares, trembling, compulsively checking the lock on his door, and being unable to watch certain things on television.

The marshals assert that since

Jackson placed his physical and emotional condition in issue, his prior medical history is clearly relevant. For example, Jackson had been shot in the knee as a young man, and he was declared completely disabled due to back injuries after an industrial accident. These events, according to the marshals, could have affected his physical and emotional condition even after the 1988 arrest. Regarding the misdemeanor convictions, the marshals assert they were properly elicited to impeach appellant by contradiction under Fed. R. Evid. 404(b). Jackson testified he was embarrassed that his neighbor saw him arrested by the marshals; the marshals assert this led the jury to believe this confrontation with law enforcement officers was unusual for him.

The court has stated that under Rule 403,

> the admission of relevant, potentially prejudicial evidence is placed within the sound discretion of the trial court. . . . In reviewing a decision of a trial court on this issue we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.

United States v. Brady, 595 F.2d 359, 361 (6th Cir.), cert. denied, 444 U.S. 862 (1979). Since Jackson's physical and emotional condition was highly relevant to the issue of damages in this case, we cannot conclude that the trial court abused its discretion by admitting the evidence at issue.

VII

Finally, we appraise whether the jury instructions were proper. Jackson objects to the following jury instructions:

> [1] If you find that the plaintiff was under arrest on the warrant, then you must find for the Defendant Deputy U.S. Marshals on

the count charging unlawful arrest.

[2] Deputy U.S. Marshals may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistaken identity or otherwise.

[3] The law recognizes that it is inevitable that Deputy U.S. Marshals will, in some cases, reasonably but mistakenly arrest the wrong person and for this they are not to be held liable.

[4] Plaintiff has no right to resist an arrest, even if the arrest is unlawful.

Jackson asserts the issues at trial were whether the marshals used excessive force during the arrest and whether, assuming they did not arrest him pursuant to the warrant, they had probable cause to arrest him for resisting arrest. Jackson claims that where an arrest is unlawful due to use of excessive force, the person arrested is entitled to resist such force in self defense. He essentially asserts that the arrest on the warrant in this case

was separate from the arrest for assault and resisting arrest, and that only the latter was at issue at the trial since summary judgment had disposed of the arrest on the warrant issue.

While the jury was instructed to find for the marshals if the arrest was on the warrant,[6] the jury was also instructed that it could find for Jackson if it found that the arrest was for resisting the marshals and that the marshals had no probable cause for the arrest for resisting arrest.[7] Regarding

---

[6] Actually the court had previously granted summary judgment to the marshals on this legal issue.

[7] The judge instructed the jury:

> On the other hand, if you find that the arrest was only for assaulting or resisting, then you must find whether or not the Plaintiff was deprived [of] liberty "without due process of law." In other words did the Defendants have probable cause to arrest the Plaintiff.
>
> Probable cause exists if the facts

the excessive force claim, the judge charged that "[a]s a matter of law, every person has the right not to be subjected to excessive force while being arrested." The judge also instructed the jury on punitive damages. Assessing the jury instructions on the whole, we cannot say that they were "confusing, misleading, or prejudicial."

---

and circumstances known to the Deputy U.S. Marshals are sufficient to warrant a reasonable law enforcement officer to believe that a crime was committed.

You are instructed as a matter of law that, a Deputy U.S. Marshal has the right to arrest a person without a warrant whenever the officer reasonably believes that such a person has forcibly assaulted, resisted, opposed, impeded, or interfered with U.S. Deputy Marshal while performing official duties.

. . . the actions of the officer in making an arrest are to be measured by the test of what a reasonable person would have believed under the same circumstances.

VIII

For the reasons mentioned, we **AFFIRM** the verdict of the jury for defendants Hoylman and Bidwell.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Ernest Jackson, Sr.,

Plaintiff

Case No. 3:89CV7208

vs.

FILED
Dec 18 1989
AM 9:33

Raymond Hoylman, et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This cause is before the Court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56, and plaintiff's opposition.

This lawsuit is properly categorized as a Bivens action. Bivens v. Six Unknown Named Agents of Federal

Bureau of Narcotics, 403 U.S. 388 (1971). Plaintiff is suing Marshals Hoylman and Bidwell for their conduct while performing their duties as Deputy United States Marshals. Specifically, plaintiff claims that defendants violated his constitutional rights under the Fourth and Fifth Amendments when they arrested plaintiff on November 30, 1988. Pendent to his federal claims, plaintiff also alleges that defendants committed state law torts of false arrest, assault and battery, and malicious prosecution.

Attached to their motion, defendants have included the transcript of a preliminary hearing held before Magistrate James G. Carr. The hearing was held to determine whether the Marshals had probable cause to arrest the plaintiff for resisting arrest, a violation of 18 U.S.C. Sec. 111. This

transcript details the events which occurred on November 30, 1988. Since the Court is satisfied that the transcript sets out in sufficient detail defendant Hoylman's version of the events, the Court, pursuant to Fed. R. Civ. P. 12(c), will treat defendants' motion as one for summary judgment.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986). . . . In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986) (quoting United

States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. Id. A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." Id. at 257.

In Count I of his complaint, plaintiff alleges that defendants violated his Fourth Amendment rights when they searched his home without a search warrant. In opposing defendants' motion for summary judgment, plaintiff claims that defendants should have first obtained a search warrant before entering his house. Defendants do not dispute that they entered plaintiff's house at 1459 Palmetto, Toledo, Ohio, nor do they dispute that they arrested plaintiff. Instead, defendants direct this Court's attention to Payton v. New York, 445 U.S. 573 (1980). In Payton, the Supreme Court held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Id. at 603.

Magistrate Carr issued an arrest warrant for Ernest Jackson. This much, plaintiff does not dispute. Since defendants were acting pursuant to an arrest warrant, this Court is satisfied that no search warrant was needed. Indeed, the Supreme Court declared in Payton that "it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen." Id. at 602.

Finding that no search warrant was needed, this Court must go on to determine whether defendants had reason to believe that the person named in the warrant, Ernest Jackson, was inside the house at 1459 Palmetto. In this respect, defendants have alleged that defendant Hoylman telephoned someone named Ernest Jackson using the telephone number listed on the back of the warrant. Further, defendants allege

that defendant Hoylman talked to an Ernest Jackson who identified himself as the juror who refused to show up for jury duty. Finally, defendants allege that they proceeded to the address listed on the back of the warrant to arrest the Ernest Jackson listed on the warrant. In response, plaintiff denies that he had a telephone conversation with defendants but admits that he owns the home at 1459 Palmetto.

In judging defendants' conduct "in light of the information available to them at the time they acted," Maryland v. Garrison, 480 U.S. 79, 85 (1987), this Court finds that defendants had reason to believe that the person named on the warrant, Ernest Jackson, could be found at 1459 Palmetto. Since plaintiff admitted that he resides at 1459 Palmetto, the information available to defendants at the time they acted would

lead them to that address in their pursuit of Ernest Jackson. Since defendants had reason to believe the suspect listed in the arrest warrant resided at 1459 Palmetto, the Court finds no genuine issue for trial on this claim.

Alternatively, plaintiff attempts to make out a violation of his Fourth Amendment rights by pointing out that the police arrested the wrong Ernest Jackson. However, in this respect, the Sixth Circuit has cited the Supreme Court for the following rule: "[T]he Constitution does not guarantee that only the guilty will be arrested; police and correction employees may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistaken identity or otherwise." Masters v. Crouch, 872 F.2d 1248, 1253 (6th Cir. 1989)(citing Baker

v. McCollan, 443 U.S. 137, 145 (1979)). This Court finds the facts in this case similar to those in Baker. While in Baker a warrant intended for McCollan's brother was used to arrest and detain McCollan, here a warrant intended for plaintiff's son was used to arrest plaintiff. The Sixth Circuit said in Masters that it could find "no case from the Supreme Court or this court holding an arresting officer with a valid warrant . . . liable in a Sec. 1983 action for arresting and detaining the wrong person for brief time due to a mistake in identity." Masters, 872 F.2d at 1253. In light of such authority, this Court will not find defendants liable for their actions. Accordingly, defendants are entitled to summary judgment on Count I of the complaint.

In Count II of his complaint, plaintiff pleads a state law cause of

action for battery and a federal cause of action for deprivation of his liberty interests. Count III of the complaint contains a state law cause of action for false arrest and a federal cause of action for deprivation of liberty without due process of law. Both counts stem from the alleged rough treatment plaintiff received at the hands of defendants. Therefore, this Court construes the federal claims to be allegations of excessive force. The Supreme Court has recently held that "such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." Graham v. Conner, 109 S. Ct. 1865, 1867 (1989). The Supreme Court said that the first inquiry which a court must make is "to isolate the precise constitutional violation with

which [the defendant] is charged." Id. at 1870. "Where, as here, the excessive force claim arises in the context of an arrest ... of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment." Id. at 1871. Therefore, notwithstanding plaintiff's claim that his due process rights were violated, the Court will examine the allegations for violations of plaintiff's Fourth Amendment rights.

To determine whether defendants' conduct rises to the level of a constitutional violation, this Court must determine whether it was reasonable. This question, in turn, is decided by balancing "the nature and quality of the intrusion" against the countervailing governmental interests at state. Id. In Graham, the Court rejected a mechanical formula for

determining reasonableness and, instead, opted for a case-by-case approach. Therefore, this Court must examine the severity of the crime at issue, whether plaintiff posed an immediate threat to the safety of defendants, and whether the plaintiff was actively resisting arrest. Id. at 1872.

In examining the last two factors, this Court finds that there is a material issue of fact that only a jury may properly resolve. Although the Graham court cautioned that the determination of reasonableness is objective and that the facts and circumstances surrounding the incident are to be judged without regard to the defendant's intent or motivation, Id. at 1872, the testimony of defendant Hoylman and the affidavit of plaintiff completely contradict one another as to the events leading up to the arrest.

Since the Court is unable to determine whether defendants were in immediate danger of being harmed without assessing the credibility of each side, this matter may not be properly decided on a motion for summary judgment. Therefore, defendants' motion for summary judgment on Counts II and III, as it relates to the federal claims, must be denied.

Defendants alternatively ask this Court to grant summary judgment as to the federal claims on the basis of qualified immunity. "Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law. Davis v. Scherer, 468 U.S. 183, 191 (1984)(citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)). Defendants do not contend, nor could they, that plaintiff's right to be

free from a police officer's use of excessive force is clearly established. Instead, defendants once again claim that there was no violation of plaintiff's rights. Since the determination of qualified immunity turns on the same objective reasonableness standard that the claim of excessive force turns on, defendants must be denied summary judgment for the same reasons as before. Assuming the facts as alleged in plaintiff's affidavit are true, this Court must conclude that a jury might return a verdict in plaintiff's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

As stated earlier, plaintiff has pleaded pendent state law claims of assault and battery, false arrest, and malicious prosecution against defendants in Counts II, III, and IV, respectively.

Defendants are entitled to summary judgment as to these state law claims. Section 2679(b)(1) of 28 U.S.C., as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694 provides the following:

> The remedy against the United States provided by [the Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

Plaintiff has asked for damages

resulting from personal injury he claims to have suffered at the hands of defendants. Plaintiff denies that defendants were acting within the scope of their employment. Moreover, plaintiff claims that the very nature of a Bivens action involves federal employees acting outside the scope of their employment. However, plaintiff has neither cited this Court to any authority for this theory nor alleged any facts which might lead a jury to believe defendants were acting outside the scope of their employment. Under such circumstances, summary judgment is appropriate. Plaintiff's remedy for his alleged damages lies strictly under the Federal Tort Claims Act. 28 U.S.C. Sec. 2679(b)(1).

THEREFORE, for the foregoing reasons, good cause appearing it is

ORDERED that defendants' motion for

summary judgment be, and hereby is, GRANTED IN PART and DENIED IN PART.

s/John W. Potter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Ernest Jackson, Sr.,

Case No. 3:89CV7208

Plaintiff

vs.

FILED
Feb 21 1992
AM 11:18

Raymond Hoylman, et al.,

Defendants

FILED
Mar 9 1992
PM 2:20

**MOTION FOR LEAVE TO
FILE ANSWER INSTANTER**

Now come the defendants and respectfully request the court for leave to file instanter their attached answer.

The motions to dismiss and summary judgment filed on behalf of defendants having been denied, in the interest of justice and in order to resolve the case on the merits, leave is now requested to answer the complaint.

Respectfully submitted,

JOYCE J. GEORGE
UNITED STATES ATTORNEY

s/Holly Taft Sydlow
Holly Taft Sydlow
Asst. United States Attorney
1716 Spielbusch Avenue
305 U. S. Courthouse
Toledo, Ohio 43624
(419) 259-6376
Reg. No. 0001122

It is so ordered:

s/John W. Potter
Judge John W. Potter

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Answer Instanter was mailed this 21 day of February, 1992 to:

James D. Godbey
George C. Rogers
Rogers and Godbey
3 John Goerlich Square
Toledo, Ohio 43624

s/Holly Taft Sydlow
Holly Taft Sydlow
Asst. United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ERNEST JACKSON, SR.,

Plaintiff,

Case No. 3:89CV7208

vs.

FILED
Feb 26 1992

RAYMOND HOYLMAN,

Defendant

George C. Rogers
Sup. Ct. #0014107
Rogers & Godbey Co.
3 John Goerlich Sq.
Toledo, Ohio 43624
Ph. (419) 241-3113
Fax (419) 241-8504
Attorneys Plaintiff

MEMORANDUM CONTRA MOTION FOR LEAVE TO FILE AN UNTIMELY ANSWER

Defendant's Motion filed on February 21, 1992 but mailed to counsel February 24, 1992 for leave to file an answer to the complaint of March 2, 1989 is a few years untimely. Significant by its absence from the motion is <u>any</u>

explanation whatsoever much less a good cause excuse as required by Rule 6(B)(2) of the Federal Rules of Civil Procedure. Without any explanation or excuse as required a Court can exercise any discretion in determining whether good cause has been shown.

s/George C. Rogers
George C. Rogers

MEMORANDUM

The Complaint was filed in the Court of Common Pleas of Lucas County on March 2, 1989. Defendant removed the action to Federal Court on March 30, 1989. Over the strenuous written objection of plaintiff, defendant on motion was given a further 60 days to May 30, 1989 to plead or answer. Defendant then moved for another 15 days

to respond to the Complaint, Defendant then moved to dismiss or for summary judgment on June 9, 1989. On December 18, 1989 the Trial Court granted part and dismissed part of the Motion to Dismiss and for Summary Judgment. Pursuant to Rule 12(a) defendant's answer was due 10 days after denial of their Motion, being December 28, 1989. Defendants failed to file an Answer on said date or thereafter. On January 16, 1990 filed an interrogatory to the Court of Appeals for the Sixth Circuit as to one of the two counts which were not dismissed by the Trial Court. On May 22, 1991, the Court of Appeals found no merit to defendant's appeal and it was dismissed. The Answer of defendants at least to the remaining counsel appealed from was due in June, 1991. The defendants filed no Answer.

The trial is scheduled for April

27, 1992 and defendant is moving to file an attached Answer with seven affirmative defenses (on which no discovery or Motions have been had) some 60 plus days prior to said Trial date.

> Rule 6(B)(2) requirement to show excusable neglect for act to be done after time specified has expired.

The U.S. Supreme recently addressed the requirements of Rule 6(b)(2) in 11 L.ed 2d in LaJan v. National Wildlife Federation (1990) 497 U.S. 695, 110 S. Ct. at pp. 720-721 and see in particular footnote 5 in pertinent part as follows:

> Rule 6(b)(1) allows a Court ("for cause shown" and its discretion") to grant a "request" for an extension of time for filing expires. After the time filing has expired, however, the Court (again "for cause shown" and "in its discretion") may extend the time only "upon motion."

Rule 6(b)(2) requires that before the Court can exercise its discretion some

allegation of good cause for the failure to comply with the filing requirements of the Civil Rule must be made. Assuming the failure to timely file was a mistake, inadvertence or neglect of counsel or ignorance of the rules, these reasons have been held by the Court not to constitute good cause under Rule 6(b)(2) and Motions alleging such excuses have been denied. Certainly a Motion that fails to even allege such feeble or erroneous excuses should also be denied. See attached Summary of Case.

Respectfully submitted,

s/George C. Rogers
George C. Rogers

s/Patricia Horner
Patricia Horner

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Contra Motion for Leave to File an Untimely Answer was served via regular U.S. Mail, postage prepaid, upon Holly Taft Sydlow, Assistant United States Attorney, 1726 Spielbusch Avenue, 305 U.S. Courthouse, Toledo, Ohio 43624, this 26th day of February, 1992.

s/George C. Rogers
George C. Rogers

s/Patricia Horner
Patricia Horner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ERNEST JACKSON, SR.,

Plaintiff,

vs.

RAYMOND HOYLMAN,

Defendant

Case No. 3:89CV7208
Judge John Potter

FILED
Feb 27 1992
PM 4:00

FILED
Mar 3 1992
PM 1:23

Patricia Horner
Sup. Ct. #0039912

George C. Rogers
Sup. Ct. #0014107
Rogers & Godbey Co.
3 John Goerlich Sq.
Toledo, Ohio 43624
Ph. (419) 241-3113
Fax (419) 241-8504
Attorneys/Plaintiff

MOTION FOR DEFAULT JUDGMENT ON FEDERAL CLAIMS II AND III AND REQUEST FOR JURY TRIAL ON DAMAGES

Plaintiff moves the Court to enter a default judgment in favor of plaintiff, Ernie Jackson, Sr., on the

Federal Causes of action set forth in Counts II and III of his Complaint which were not dismissed by the Court and to which no Answer has been filed within the time provided by the Civil rules, and Order that the determination of damages be set down for Jury Trial. This Motion is based upon the Court record and filings herein and on the Affidavit of George C. Rogers, one of the attorneys for plaintiff, which is attached hereto.

s/Patricia Horner
Patricia Horner

NOTICE OF MOTION

Please take notice that the undersigned will bring the above application on for hearing before this Court in Courtroom Number ____, United States Court House, _____ on _____, 1992, at

_____ o'clock __.m. of that day or as soon as thereafter as counsel can be heard.

s/Patricia Horner
Patricia Horner

MOTION DENIED

s/John W. Potter
John W. Potter
United States District Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Default Judgment on Federal Claims II and III with Affidavit and Request for Jury Trial on Damages was served via regular U.S. Mail, postage prepaid, upon Holly Taft Sydlow, Assistant United States Attorney, 1716 Spielbusch Avenue, 305 U.S. Courthouse, Toledo, Ohio 43624, this 27th day of February, 1992.

s/Patricia Horner
Patricia Horner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ERNEST JACKSON, SR.,

Plaintiff,

vs.

RAYMOND HOYLMAN,

Defendant

Case No. 3:89CV7208

AFFIDAVIT

Patricia Horner
Sup. Ct. #0039912
Rogers & Godbey Co.
3 John Goerlich Sq.
Toledo, Ohio 43624
Ph. (419) 241-3113
Fax (419) 241-8504
Attorney/Plaintiff

I, George C. Rogers, being duly sworn, say:

1. I am one of the attorneys for plaintiff in the above-entitled action.

2. A copy of the Summons and Complaint were originally filed in the Court of Common Pleas of Lucas County, Ohio, Case #89-0768 and service was made upon defendants Bidwell and Hoylman on March 7, 1989.

3. Defendants, Hoylman and Bidwell removed the action to The United States District Court for the Northern District of Ohio, Western Division, Case No. 3:89 CV 7208 on March 30, 1989.

4. Defendants moved for an extension of time to plead or answer until May 30, 1989, which Motion was granted.

5. Defendant moved for a further extension of time to plead or answer for an additional 15 days which was granted.

6. On June 9, 1989 defendants filed a Motion to Dismiss the Complaint.

7. On October 31, 1989 pursuant to leave of Court service was perfected on the Attorney General of the United States.

8. On December 18, 1989 the Court overruled the Motion to Dismiss as to the Federal Claims in Counts II and III of the Complaint.

9. No answer was filed by defendants Hoylman and Bidwell on December 18, 1989 or thereafter.

10. On January 16, 1989 defendants Hoylman and Bidwell appealed the Order of the U.S. District Court such portion that held that Federal Claim in Count II was not dismissed.

11. The Sixth Circuit Court of Appeals on May 22, 1991, affirmed the part of the Order of the U.S. District Court that was appealed by defendant.

12. From May 22, 1991 to the present February 25, 1992 no answer was filed by the defendants, Hoylman

and Bidwell, to the undismissed Federal Claims in Counts II and III of the Complaint.

13. Plaintiff, Ernie Jackson, Sr., has suffered personal injury including physical pain to his back and mental and emotional distress as a result of the conduct alleged as Federal claims in Counts II and III of the Complaint and he requests that damages for such injury be determined by a jury.

Further affiant saith naught.

s/George C. Rogers
George C. Rogers

Sworn to before me and signed in my presence this 27th day of February, 1992.

s/James D. Godbey
NOTARY PUBLIC

My Commission has no expiration date.

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit was served, via regular U.S. Mail, postage prepaid, upon Holly Taft Sydlow, Assistant United States Attorney, 1716 Spielbusch Avenue, 305 U.S. Courthouse, Toledo, Ohio 43624, this 27th day of February, 1992.

s/Patricia Horner
Patricia Horner

BEST AVAILABLE COPY

Warrant for Arrest

United States District Court

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA
V.

WARRANT FOR ARREST

Ernest Jackson

CASE NUMBER: MISC. 88-7251

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest Ernest Jackson
Name

and bring him or her forthwith to the nearest magistrate to answer a(n)

☐ Indictment ☐ Information ☐ Complaint ☒ Order of court ☐ Violation Notice ☐ Probation Violation Petition

charging him or her with brief description of offense Contempt of Court Order

I hereby certify that the
instrument is a true and
correct copy of the original
on file in my office.
Attest: James G. Carr, Clerk
U.S. District Court
N.D. Ohio Western Div.
By Patricia A. Wilson
Deputy Clerk

in violation of Title 18 United States Code, Section(s) 401(3)

James G. Carr
Name of Issuing Officer

Signature of Issuing Officer

(By) Deputy Clerk

United States Magistrate
Title of Issuing Officer

November 29, 1988 at Toledo, Ohio
Date and Location

DEFENDANT'S COPY

Bail fixed at $ _____ by James G. Carr
Name of Judicial Officer

RETURN

This warrant was received and executed with the arrest of the above-named defendant at _____

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE OF ARREST		

THE FOLLOWING IS FURNISHED FOR INFORMATION ONLY:

DEFENDANT'S NAME: Ernest J. Jackson

ALIAS: _____

LAST KNOWN RESIDENCE: 1439 Palmetto, Toledo, OH 43606 Phone: 244-2168

LAST KNOWN EMPLOYMENT: Minister

PLACE OF BIRTH: _____

DATE OF BIRTH: Age 23 as of January 1988

SOCIAL SECURITY NUMBER: 300-66-7451

HEIGHT: _____ WEIGHT: _____

SEX: Male RACE: Black

HAIR: _____ EYES: _____

SCARS, TATTOOS, OTHER DISTINGUISHING MARKS: _____

_____

_____

FBI NUMBER: _____

COMPLETE DESCRIPTION OF AUTO: _____

_____

INVESTIGATIVE AGENCY AND ADDRESS: _____

_____

_____